

ARKANSAS SUPREME COURT

No. CR 06-871

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered October 26, 2006

MICHAEL D. BELL
Petitioner

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF UNION
COUNTY, CR 2005-52-4, HON. CAROL
CRAFTON ANTHONY, JUDGE]

v.

STATE OF ARKANSAS
Respondent

MOTION TREATED AS MOTION FOR
RULE ON CLERK AND REMANDED

PER CURIAM

Michael D. Bell was convicted by a jury of possession of a controlled substance with intent to deliver (cocaine), possession of drug paraphernalia and three counts of delivery of a controlled substance (cocaine). His sentence was enhanced for distribution of a controlled substance near certain facilities and he received an aggregate sentence of 876 months' incarceration.

The judgment and commitment order was entered on December 5, 2005, and an amended judgment and commitment order was entered on January 4, 2006. On December 6, 2005, petitioner's trial counsel timely filed a post-trial motion for reduction or modification of sentence. The trial court did not act on the motion and it was deemed denied on January 5, 2006. Petitioner filed a *pro se* notice of appeal on January 4, 2006. Therein, he sought to appeal the sentence he received from the charge of possession of a controlled substance with intent to deliver (cocaine). Subsequently, petitioner filed in the trial court a *pro se* "motion for disposition of appeal" on March 24, 2006.

Now before this court is petitioner's *pro se* motion for belated appeal. As petitioner's *pro se* notice of appeal was timely filed, we treat the motion as a motion for rule on clerk rather than a motion for belated appeal. *See Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (*per curiam*); *see also Muhammed v. State*, 330 Ark. 759, 957 S.W.2d 692 (1997) (*per curiam*).

In his motion, petitioner maintains that he instructed his trial counsel to file a notice of appeal, but that trial counsel failed to do so and instead filed a post-trial motion for reduction or modification of sentence. He claims he lost contact with his trial counsel while incarcerated in the Union County jail and made several failed attempts to contact trial counsel by mail, including by certified mail.

It is the practice of this court when a *pro se* motion for belated appeal or rule on clerk is filed and the record does not contain an order relieving trial counsel to request an affidavit from the trial counsel in response to the allegations in the motion. The affidavit is needed to act on a motion for rule on clerk because Ark. R. App. P.–Crim. 16(a) provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. Nevertheless, a defendant may waive his right to appeal by his failure to inform trial counsel of his desire to appeal within the thirty days allowed for filing a timely notice of appeal under Ark. R. App. P.–Civ. 4(a). *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (*per curiam*).

In his affidavit to this court, petitioner's trial counsel responded that before the time to file a notice of appeal had expired, petitioner apprised trial counsel that he had obtained the services of a different attorney and paid that attorney a retainer. The other attorney confirmed to trial counsel

that he had been hired by petitioner to pursue an appeal, at which point trial counsel ended his communications with petitioner. However, trial counsel failed to move for withdrawal from petitioner's representation based upon the assurances of petitioner and the other attorney and never verified that the other attorney filed a motion for substitution.¹

Trial counsel also disputes petitioner's claim that he was not in contact with petitioner and responds that he communicated with petitioner several times in person while petitioner was being held at the Union County jail. These communications continued until the time petitioner informed trial counsel he had hired another attorney to represent him on appeal. As of the last communication between trial counsel and petitioner, the motion for reduction or modification of sentence was still pending, thus trial counsel's filing a notice of appeal prior to that time would have been premature. During the period in question, trial counsel was being treated multiple times in Dallas, Texas, for a heart condition which required heart surgery.

As petitioner and trial counsel's assertions are in contradiction and the resolution of those contradictions requires findings of fact which must be made in the trial court, we remand this matter to the circuit court for an evidentiary hearing on the issues of whether trial counsel was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal from the amended judgment and commitment order and whether trial counsel was obligated to perfect an

¹After assuring trial counsel that he would be representing petitioner, the second attorney did not undertake representation of petitioner. Apparently the relationship ended when petitioner failed to pay the new attorney for his services.

According to trial counsel's affidavit to this court, problems initially arose between petitioner and trial counsel because petitioner failed to pay trial counsel for services despite repeated assurances by petitioner that he would. Further, petitioner failed to cooperate in preparation for his trial and failed to appear for trial. Trial counsel sought to be removed as counsel of record, but the trial court denied the motion, and trial counsel represented petitioner during the jury trial.

appeal. The trial court is directed to enter Findings of Fact and Conclusions of Law within ninety days and submit the findings and conclusions to this court with the transcript of the evidentiary hearing.

Remanded.